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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. ...1004

DOROTHY BRASWELL, Administratrix of the Estate of Courtney L. Braswell, Deceased,
Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois.

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To the Supreme Court of Illinois.

Petitioner, Dorothy Braswell, Administratrix of the Estate of Courtney L. Braswell, deceased, a natural person, now petitions the Supreme Court of the United States to issue its Writ of Certiorari to review the final judgment of the Supreme Court of Illinois in the cause entitled: "Dorothy Braswell, Administratrix of the Estate of Courtney L. Braswell, deceased, Petitioner v. The New York, Chicago and St. Louis Railroad Company, Respondent," which final judgment denied petitioner a review by the Supreme Court of Illinois of a decision of the Appellate Court of Illinois, Fourth District, in the cause in the last named court entitled: "Dorothy Bras-

well, Administratrix of the Estate of Courtney L. Braswell, deceased, Plaintiff-Appellee v. The New York, Chicago and St. Louis Railroad Company, Defendant-Appellant." The decision of the Appellate Court reversed without remandment a prior judgment entered by the Circuit Court of Madison County, Illinois, on the verdict of a jury, in the amount of Sixty-Five Thousand Dollars ($65,000.00) in favor of Petitioner's decedent, Courtney L. Braswell and against Respondent, The New York, Chicago and St. Louis Railroad Company.

REPORTS OF OPINIONS BELOW.

The judgment of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal was entered on January 21, 1964, and was not accompanied by an opinion.

The Appellate Court of Illinois filed its opinion June 3, 1963, and it is reported in 43 Ill. App. 2d 21, 192 N. E. 2d 592.

A Petition for Rehearing was denied September 30, 1963. The Court's opinion is set forth as Appendix to this petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

(i) The date of judgment of the Supreme Court of Illinois sought to be reviewed is January 21, 1964. It was entered on that day.

(ii) No rehearing of the judgment was sought or ordered and there has been no extension of time within which to seek Certiorari.

(iii) The statute confirming jurisdiction on this Court to review by Writ of Certiorari is U. S. C., Title 28, Section 1257 (3).

QUESTION PRESENTED FOR REVIEW.

The suit is one for damages under the Federal Employer's Liability Act, brought by a section laborer against his railroad employer for injuries resulting in whole or in part from the negligence of employer's medical staff in assigning him to a job he was physically unable to perform. He suffered a physical collapse from the strain and exertion of lifting railroad ties and fell unconscious at his place of work on the railroad's right-of-way sustaining compressed fractures of two vertebrae, rendering him permanently and totally disabled.

The theory of liability upon which the case was tried was that the employer's medical staff, having full knowledg of plaintiff's physical condition, negligently assigned him to work at a job he was physically unable to perform, and he was kept on that job in spite of complaints made by a foreman to his superiors that plaintiff could not perform his work.

The jury returned a verdict in favor of the plaintiff and the trial court entered judgment thereon.

The Question Presented for Review Is:

Can an Appellate Court properly reverse the judgment of the trial court and set aside the verdict of a jury on the ground that, to use the language of the Appellate Court: "Under the facts and circumstances on the record before us, we cannot say that there was positive proof of actionable negligence as the proximate cause of injuries suffered by plaintiff" (App. p. 24) when there is evidence in the record as follows:

(a) Dr. Wahl, examining physician for the defendant, testified and was quoted in other testimony as having an opinion that Braswell was physically unfit to perform

the work or withstand the physical strain of section gang labor (A. 88, 89). Dr. Wahl is quoted as saying, "You're not able to go to work on that job, that work will kill a good man, let alone one in your shape . . ." (A. 89).

(b) Dr. Donald C. Darrah, Assistant Medical Director of defendant railroad, told plaintiff on June 10, 1957, not to do any heavy lifting and that he would see to it that plaintiff would not be required to do such work (A. 56, 57, 90).

(c) The testimony of Louis Schien, foreman, that plaintiff could not perform the work assigned to him, and that Schien complained to his superiors about it (A. 44).

(d) Plaintiff's physical collapse into unconsciousness while performing a heavy task thus demonstrating his physical inability to perform the job assigned to him (A. 36, 40).

(e) Defendant's failure to present any evidence tending to prove plaintiff's collapse was due to any cause other than his physical incapacity to perform the work assigned to him.

(f) Dr. Edward L. Hediger's testimony that plaintiff was unfit for any work requiring heavy lifting or physical stress or strain (A. 73).

(g) The testimony of fellow laborers, James Garrison (A. 56), Maynard Hemkin (A. 40) and Foreman Louis Schien (A. 43), that Braswell was physically unable to perform the work although he tried to do so.

(h) Braswell's fellow employees saw him collapse and fall unconscious to the ground (A. 36, 38, 40, 42, 47, 48).

STATUTE INVOLVED.

The statute involved is U. S. C., Tit. 45, § 1, as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 1, 53 Stat. 1404."

STATEMENT OF THE CASE.

Courtney Braswell, the plaintiff, age 59, married and the father of six children, had earned his living at various laboring jobs from the time he was ten years old until he became ill with lung cancer in 1955 and had never been unemployed for any substantial length of time (A. 84, 93, 94). He worked for the defendant railroad as a section laborer from 1947 until his illness in 1955 and under foreman, Louis Schien, from 1950 until 1955. Before his illness Braswell was a good worker (A. 43). Beginning in November, 1955, a series of operations was performed at Barnes Hospital, St. Louis, Missouri, in a clinic directed by Dr. Thomas Burford. These operations involved the removal of his entire right lung and all of the ribs on the right side. He was not discharged from treatment until October 1, 1956 (A. 53, 63, 64, 86 and 87).

A Dr. Ferguson, one of Dr. Burford's subordinates, discharged Braswell from the clinic on October 1, 1956 to go back to work. Neither Dr. Burford nor Dr. Ferguson ever examined or treated Braswell (A. 87, 88 and 96). Shortly thereafter he reported to his superior for work and was referred to Dr. Eugene Wahl of Edwardsville, Illinois (A. 88 and 89), an examining physician for the defendant. Dr. Wahl has held this post for about 35 years and has examined hundreds of prospective employees (A. 75). He refused to pass or approve Courtney Braswell as physically fit to work and referred him to Dr. John W. Houk, the Medical Director of the railroad in Cleveland (A. 81, 88, 89 and 126). Dr. Wahl said to Courtney Braswell, "You're not able to go to work on that job; that work will kill a good man, let alone one in your shape and I don't want them sending you here no more" (A. 89). Plaintiff was given thorough physical examinations on two separate occasions in Cleveland in

February and March of 1957 and a superficial one on June 10, 1957 (A. 125, 126, 89, 90). At the request of Dr. Donald C. Darrah, Assistant Medical Director of the Defendant, a disputed letter from Dr. Burford was obtained (A. 90). The introduction of this letter into evidence by the defendant was refused by the trial court (A. 130) (Defendant's Exhibits No. 2 and No. 3 are the same, see A. 130 and 154). Defendant raised the issue of the admissibility of this letter on appeal. The Appellate Court did not decide this issue but did refer to the letter in its opinion as follows: "One doctor refused to certify him for employment and finally plaintiff went to Cleveland, where he was examined by defendant's Assistant Medical Director who refused to pass him for work, but suggested it might be helpful if he obtained a written report from the St. Louis surgeon. The surgeon wrote a letter to the Medical Director for defendant Railroad Company, concluding that he considered plaintiff definitely employable. Another doctor for the railroad thereupon authorized plaintiff to return to work, and plaintiff resumed work on June 13, 1957." A correct statement of facts concerning this letter and events connected with it are as follows: Dr. Donald C. Darrah, Assistant Medical Director of defendant railroad, has offices in Cleveland with Dr. John W. Houk, the Medical Director (A. 118). A complete physical examination was given Braswell by Dr. Darrah at Cleveland on Feb. 15, 1957 (A. 126). Dr. Darrah postponed making a decision on Braswell's physical condition and fitness for work (A. 55, 90, 126). He asked Braswell, "Would you have Burford to write me a letter up here explaining your condition"? (A. 90).

On June 10, 1957, Dr. Houk authorized plaintiff's return to work knowing the nature of the work he was to perform (A. 125). Dr. Darrah also approved Braswell for work saying, "I'm going to put your husband back to work," and he added, "Help me take care of him" (A.

90). Dr. Darrah instructed Braswell in the presence of Dorothy Braswell, his wife, not to do any heavy lifting and he said he would notify Bracken's office to that effect (A. 56, 57, 90). Dave Bracken was the superior officer of Louis Schien, foreman over Braswell (A. 42, 44). Drs. Houk and Darrah did see the disputed letter which specifically states, "This man has asked that I write you the facts concerning his illness and operations . . .". Then follow the facts (which are not disputed or an issue in this case) and closes with the gratuitous and objectionable opinion, "I consider him definitely employable."

Dr. Darrah failed to notify Dave Bracken or Louis Schien that Braswell was not to do any heavy lifting (A. 50, 91).

Braswell returned to work on June 13, 1957 and suffered a physical collapse and injury from the strain and exertion of lifting ties on July 3, 1957, as alleged in paragraph 3 of the Complaint (A. 2, 36, 40 and 47). He remained unconscious until treated at St. Joseph's Hospital in Highland, Illinois, the same day (A. 92). His physical injuries were diagnosed as compressed fractures of the first and second lumbar vertebrae (A. 71). During the short time he worked in June and July of 1957, he was not able to perform the work assigned to him (A. 43 and 44).

James Garrison, a fellow laborer, testified, "Courtney could not do the work that was assigned to him although he made an effort to do it" (A. 36). Maynard Hemkin, a fellow laborer, testified, "Well, he couldn't lift with us" (A. 40). The foreman, Louis Schien, noticed that Braswell was not able to perform his task and testified, "When Braswell came back to work on June 13, his physical appearance was different than when he left the job in 1955. It didn't seem to me he had any body on his right side. He was willing to do his work when he came

back, but it looked to me like it was awful hard on him. He worked at it, I'll say that for him, but he didn't perform as the other men did" (A. 43).

"I complained to my superior officer, Dave Bracken . . ." (A. 44).

Mr. Schien also talked to a Mr. Cricket, Bracken's assistant (A. 44, 45), who responded, "You'll have to get along with him the best you can because the doctor turned him loose to go back to work" (A. 46 and 47). Braswell did not complain and tried to perform his job (A. 43). He was as persistent in his desire to be reemployed as he was in trying to perform his work. He felt that it was necessary for him to work (A. 88 and 89), and relied on the medical staff of the defendant railroad to determine his fitness for work (A. 100, 103 and 115).

Dr. Edward L. Hediger of Highland, Illinois, the physician who treated Braswell while he was a patient at St. Joseph's Hospital in Highland, testified, "I personally would be very hesitant to send a man back to hard manual labor after this type of surgery and his general physical condition" (A. 73) and stated that such a man as Braswell could perform any type of work that did not require heavy lifting or physical stress or strain (A. 73).

Before Braswell collapsed while moving railroad ties on July 3, 1957, he was able to perform some work; afterwards, he could not stand up even for X-rays of his spine (A. 72).

Prior to July 3, 1957, although Braswell had a series of operations as described, there is no evidence of any other traumatic injury. After July 3, 1957, and at the time of the trial, Braswell was totally disabled (A. 60, 83, 94). Although defendant in its Amended Answer denies that plaintiff suffered any injuries (A. 25), it states by affidivit in support of a Motion for Continuance that plaintiff sus-

tained recent fractures of the spine as revealed by X-rays taken by defendant's doctors (A. 24). After being discharged from St. Joseph's Hospital, Braswell sought medical attention and relief from the pain resulting from his injury, insofar as his financial resources would permit (A. 92 and 93). He became totally disabled, unfit for even the lightest work and suffered pains in his back (A. 83, 84 and 94). Plaintiff's normal weight prior to 1955 was about 135 pounds (A. 94). He weighed 105 pounds when assigned to work on June 10, 1957 (A. 59), and at the time of the trial weighed 107 pounds (A. 94). He was 5' 3" tall. The only X-ray available to him of his spine, taken before the injury of July 3, 1957, reveal no deformity (A. 78). The X-rays taken by Drs. Hediger and Rehberger after the injury were introduced in evidence by the plaintiff. Defendant did not offer in evidence any of the X-rays taken by its medical staff in February and March of 1957 or those taken by its doctors after July 3, 1957. Defendant offered no evidence concerning plaintiff's injury or disability although he was examined thoroughly before July 3, 1957 (A. 89, 90, 125 and 126), and after July 3, 1957. The case was tried before the judge and jury in the Circuit Court of Madison County on January 15, 16, 17 and 18, 1962, and the jury returned a verdict for the plaintiff and against the defendant assessing damages in the amount of $65,000.00. All post trial motions were denied and judgment entered on the verdict on January 19, 1962. Thereafter, defendant appealed to the Appellate Court of Illinois, Fourth District. During the pendency of the appeal, Courtney Braswell died and his widow, Dorothy Braswell, was named Administratrix of his estate by the Probate Court of Madison County, Illinois. Dorothy Braswell, as Administratrix, has been substituted as party plaintiff. On June 3, 1963, the Appellate Court filed its opinion reversing the judgment of the trial court and entered judgment for the defendant. Petitioner

filed a timely Petition for Rehearing which was denied September 30, 1963, the date of final judgment in the Appellate Court. Thereafter, Petitioner filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois which was denied January 21, 1964 without opinion. No rehearing was sought or ordered.

RAISING OF FEDERAL QUESTION.

The applicability of federal law was inherent from the inception of this case: the complaint was founded on the Federal Employers' Liability Act. The opinion of the Appellate Court of Illinois (Appendix) shows the filing under that act, and the determination of the cause under that act.

NO REVIEW OF FEDERAL COURT DECISION SOUGHT.

No review of any federal court judgment is sought by this petition.

ARGUMENT AND REASONS FOR THE ISSUANCE OF WRIT.

The Illinois courts in their decisions below continue to invade the province of the jury in F. E. L. A. cases by determining that evidence introduced by the plaintiff was of insufficient weight to warrant a verdict in favor of the plaintiff despite decisions of this court.

> "We think that the Illinois Courts improperly invaded the function and province of the jury in this case."
>
> Harrison v. Missouri Pacific Railroad Co. (372 U. S. 248, 249).

In the case at bar the Appellate Court said: "Under the facts and circumstances on the record before us, we

cannot say that there was positive proof of actionable negligence as the proximate cause of the injuries suffered by the plaintiff . . ." (App. p. 24). This statement is in error in law and fact.

Plaintiff proved the following actionable negligent acts or omissions on the part of defendant:

(a) Dr. Houk's authorization of June 10, 1957 for plaintiff, Courtney Braswell, to return to employment as a section gang laborer (A. 125).

(b) Dr. Darrah's failure to notify plaintiff's foreman, or other person in authority, that plaintiff was not to do any heavy lifting (A. 50, 56, 57 and 90).

(c) Defendant's failure to act upon the knowledge of and information given by its foreman, Louis Schien, relative to plaintiff's physical incapacity to perform the work of a section laborer (A. 43, 44, 45, 46 and 47).

The defendant has not denied, nor does the Illinois Court question the fact of plaintiff's collapse into unconsciousness almost instantly after helping to carry the last of four railroad ties he and fellow workmen were placing on a small pushcar on defendant's right-of-way during the course of his employment on July 3, 1957.

The following evidence was introduced to sustain plaintiff's contention that defendant negligently assigned plaintiff to a job he was physically unable to perform:

1. The undisputed testimony that he did collapse into unconsciousness while attempting to perform his work (A. 36, 40).

2. The testimony of Dr. Eugene Wahl, examining physician for the defendant, that he refused to pass or approve plaintiff as physically fit to work (A. 88, 89, 126).

3. Dr. Wahl's statement to Braswell that he was unable to work as a section laborer and that such work would kill a good man, to say nothing of a man in Braswell's physical condition (A. 89).

4. The statement of Dr. Donald C. Darrah, Assistant Medical Director of the defendant, that plaintiff was to do no heavy lifting, and that he would notify the proper supervisory personnel to that effect (A. 56, 57, 90).

5. The testimony of Louis Schien, foreman, that Braswell could not perform the work assigned to him and that Schien complained to his superiors about it (A. 44).

6. The testimony of Dr. Edward L. Hediger, who examined and treated plaintiff at St. Joseph's Hospital, Highland, Illinois, on July 3, 1957, that a man in Braswell's physical condition was unfit for any work requiring heavy lifting or physical strain (A. 73).

7. The testimony of fellow laborers, James Garrison (A. 56); Maynard Hemkin (A. 90); and the foreman, Louis Schien (A. 43) that Braswell was physically unable to perform the work although he tried to do so.

8. The subsequent examination of plaintiff which revealed no other cause for his collapse (A. 72).

9. And finally, the evidence of plaintiff's general physical condition, slight build, and his previous operative history (A. 94, 95, 96).

The following direct and circumstantial evidence was introduced to prove a causal connection between plaintiff's collapse and his injury:

1. The undisputed testimony that immediately before he collapsed plaintiff had assisted in carrying four railroad ties (A. 36, 40).

2. The examination, diagnosis and treatment of compressed fractures of the first and second lumbar vertebra by Doctor Hediger (A. 71).

3. X-ray pictures taken July 5, 1957, in St. Joseph's Hospital, showing the fractures in question, and X-ray pictures taken by Doctor Lester Rehberger January 18, 1958, showing the healed-compression fracture (A. 62).

4. The undisputed testimony that plaintiff was examined and X-rayed by defendant's doctors on two occasions shortly before he was employed on June 10, 1957 (A. 89, 90, 125, 126). The defendant did not offer these X-rays in evidence.

5. The undisputed evidence that plaintiff worked from June 13th to July 3, 1957, the day of his injury (A. 35, 40, 43).

The courts below have imposed a burden of proof not sanctioned by this court in cases brought under the Federal Employers' Liability Act ignoring the repeated declarations of this court in such cases. The Illinois courts continue to apply common law principals in respect to the sufficiency of evidence, and when the evidence does not meet what in their opinion is an acceptable quantum of proof, simply announce that there was no evidence, or positive evidence, or that circumstantial evidence is insufficient to justify recovery. Such determinations are not permissible under actions brought under the F. E. L. A.

> "Judicial appraisal of the proofs (in a Federal Employers' Liability Act case) to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal

and, if that test is met, are bound to find that a case for the jury is made out, whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence."

Rogers v. Missouri Pacific, 352 U. S. 500, 507, 1 L. Ed. 2d 493, 77 S. Ct. 443.

"The decisions of this Court after the 1959 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

(Ibid. 510.)

It is only when there is a complete absence of probative facts to support the conclusion reached that the jury's verdict based upon the conclusion may be set aside by the Appellate Court.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required. . . . Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and the Appellate Court's function is ex-

hausted when that evidentiary basis becomes apparent, ..."

Lavender v. Kurn, 327 U. S. 645, 653.

The Court below commented disparagingly of the sufficiency of circumstantial evidence. Although there is substantial direct evidence in the record, a verdict must be sustained if based upon circumstantial evidence alone.

"The burden of the employer is met, and the obligation of the employer to pay damages arises when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

Rogers v. M. Pac. R. R. Co., 352 U. S. 500, 508.

"As previously noted, the evidence pertaining to the alleged accident is entirely circumstantial. The Court has repeatedly held that the fact that an injury resulting in death arose out of employment need not be proved by direct evidence, but may be established by circumstantial evidence leading to a logical and reasonable inference that the injury originated in a risk of the employment."

Siete v. Industrial Commission, 24 Ill. 2d 368, 375, 181 N. E. 2d 156, 159.

". . . the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that * * * the jury may also with reason * * * attribute the result to other causes, including the employee's contributory negligence."

Southern Railroad Co. v. Welch, 247 F. 2d 340, 342.

"General common law rules of liability, and state practices in respect of the sufficiency of evidence, do not govern cases under the Federal Employers' Liability Act, for the legislation is an avowed departure from the common law—a response to the special needs of railroad workers."

Tiller v. Atlantic Coast Line, 318 U. S. 54;
Sinkler v. Missouri Pacific, 356 U. S. 326;
Lavender v. Kurn, 327 U. S. 645.

The Appellate Court said, "None of the doctors called on behalf of plaintiff expressed an opinion as to whether there might have been a relationship between the work he did as a cause of his unconsciousness and fall to the ground and his resulting disability" (Appendix p. 23).

Although the Court accepted the fact of plaintiff's disability, petitioner has difficulty interpreting the foregoing quotation. Regardless of the intended meaning of the quotation, petitioner respectfully submits that a doctor's testimony as to what "might have been a relationship between" any of the acts and conditions mentioned in the quotation was not required, even if admissible, because of the direct and circumstantial evidence introduced by plaintiff.

"Expert testimony is admissible when the inquiry is such that only persons of skill, experience and knowledge in the subject of the inquiry can form a correct judgment; . . . The testimony of experts is received in evidence on matters of their superior knowledge, but is not received on matters of common knowledge, or where the jury can properly comprehend and weigh the facts."

Illinois Law and Practice, Volume 18, pages 434, 435.

"The general rule, as pronounced by the Illinois courts, is that, in a personal injury action where the evidence is conflicting as to whether plaintiff was injured in the manner claimed, opinion testimony on such subject is incompetent, but that where there is no dispute as to the manner of injury and the question is whether certain principal conditions were caused by the injury complained of and the determination of such question involves a special skill or trade or knowledge of science not within the experience of laymen possessing the education or knowledge common to those moving in the ordinary walks and engaged in the ordinary occupations of life, persons possessing such special knowledge, skill, or science may testify as to their opinions on the subject.

Accordingly, where there is no dispute as to the fact, manner and cause of an injury resulting from the acts complained of, a physician may directly testify that a later disability, malady, or death was or was not caused by the original injury. But when there is a conflict in the evidence as to whether the injury was received in the manner charged, it is not competent for witnesses, even though testifying as experts, to give their opinion as to the cause of disability or death."

Illinois Law and Practice, Volume 18, pages 450, 451.

CONCLUSION.

The trial court fully and correctly instructed the jury on negligence and contributory negligence, and the jury correctly decided that defendant was negligent and plaintiff's negligence, if any, was minute compared to that of defendant's staff of medical specialists. It was undisputed that plaintiff wanted to work, felt it was necessary for

him to work, and relied on the opinion and decision of defendant's doctors concerning his physical fitness for work. While moving railroad ties he collapsed and was found to have sustained compressed fractures of two lumbar vertebrae. He was treated in a hospital in the customary and approved way and later received treatments for pain which brought him only temporary relief. X-rays were taken in the hospital immediately after the injury and again in January, 1958. These X-rays were introduced in evidence and interpreted by the treating physicians. A doctor employed by the Social Security Agency testified that plaintiff was disabled. This evidence and testimony was not denied by defendant who offered no medical evidence or testimony of any kind except that of Dr. Houk.

The only conclusions the jury could reach were that defendant was negligent as alleged, plaintiff was injured as alleged, and at the time of trial was totally and permanently disabled and entitled to substantial damages. He was a man of limited education and ability for anything other than physical labor. There are many kinds of labor and section labor is one of the hardest. From June 13, 1957 until July 3, 1957 plaintiff was able to perform some physical tasks and if he had not collapsed under the strain of section labor he could have been employed at light work. In addition, plaintiff's physical condition was such that any injury or illness would be very serious. During the course of the appeals he has died leaving his wife with two minor children.

The trial court has the only opportunity to see and hear the witnesses and examine the evidence and to weigh and consider the verdict of the jury in the light of all that transpired during the trial. It is only when the trial court has committed serious error, thereby denying the parties a fair trial, and the jury has returned a shockingly inadequate or excessive verdict, that an appellate court may

properly disturb the judgment of the trial court by ordering a new trial.

In this case the Appellate Court of Illinois, Fourth District ignored the facts and repeated its previous legal errors in cases involving the F. E. L. A.

Wherefore, Petitioner respectfully asks this court to issue its writ of certiorari to the Supreme Court of Illinois.

Respectfully submitted,

DOROTHY BRASWELL, Administratrix of the Estate of Courtney L. Braswell, Deceased,

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APPENDIX.

OPINION OF THE APPELLATE COURT.

State of Illinois,
Appellate Court,
Fourth District.

May Term, A. D. 1963.

Term No. 63-F-6. Agenda No. 10.

Dorothy Braswell, Admrx. of the Estate of Courtney L. Braswell, Deceased,
Plaintiff-Appellee,
vs.
The New York, Chicago and St. Louis Railroad Company,
Defendant-Appellant.

Appeal from the Circuit Court of Madison County, Illinois.

Culbertson, P. J.

This cause is before us on appeal from a judgment in the sum of $65,000.00, based on a verdict of a jury in a Federal Employers' Liability Act case instituted by Courtney L. Braswell, as plaintiff, as against The New York, Chicago and St. Louis Railroad Company, as defendants. During the pendency of this appeal, plaintiff's death has been suggested, and Dorothy Braswell, Administratrix of the Estate of Courtney L. Braswell, has been substituted as party plaintiff.

The case is unusual in that the negligence alleged is predicated on alleged negligence of defendant company in the assigning of Braswell to a job which it was con-

tended he was physically unable to perform. Braswell, who was 60 years of age, had been working as a section hand since 1947, and had apparently performed the duties satisfactorily until the early part of 1955 when he developed a persistent cough. This became sufficiently severe in November, 1955, so that on the advice of his personal physician he was hospitalized in St. Louis. The doctors there found him suffering from a carcinoma of the right lower lobe of the lung, and a portion of the lung was removed surgically. He was discharged from the hospital and thereafter developed an infection in his chest cavity which resulted in a series of operations involving a rib resection, drainage, and plastic repair of the chest cavity. On October 1, 1956, he was given a written release by the surgeon, reciting that he was able to return to work. He then reported to his foreman with a request that he be returned to work as a section hand, his former type of work. For a period of eight months, until he was permitted to return to work in June of 1957, he made repeated demands to be returned to the job as a section hand.

One doctor refused to certify him for employment, and finally plaintiff went to Cleveland, where he was examined by defendant's Assistant Medical Director who refused to pass him for work, but suggested it might be helpful if he obtained a written report from the St. Louis surgeon. The surgeon wrote a letter to the Medical Director for defendant Railroad Company, concluding that he considered plaintiff definitely employable. Another doctor for the railroad thereupon authorized plaintiff to return to work, and plaintiff resumed work on June 13, 1957. He continued to work without any complaint or incident (including Saturdays and Sundays), until the morning of July 3, 1957. He helped carry railroad ties and did other sectional work without experiencing any physical disability in so doing, and made no complaint of any kind in

connection with such work. On July 3, 1957, while acting with the other three men in his section in carrying railroad ties, he suddenly collapsed. There was nothing unusual, so far as the record discloses, in the work which was done at the time of his collapse. None of the doctors called on behalf of plaintiff expressed an opinion as to whether there might have been any relationship between the work he did as a cause of his unconsciousness and fall to the ground and his resulting disability.

On appeal in this Court it is the defendant's position that the proof produced to support plaintiff's cause of action was insufficient, as a matter of law, to present a submissible question to the jury thereon, and that the Trial Court should have allowed the motion for judgment notwithstanding the jury's verdict.

It is apparent that plaintiff relied wholly upon the circumstances and was not able to, or at least did not specifically make a showing of a causal connection of the collapse of plaintiff and his subsequent injury. Plaintiff states specifically that the circumstances speak for themselves and that plaintiff was undergoing what for him in his physical condition was extreme physical exertion, and that the collapse was the result. None of the persons who were with plaintiff could offer any explanation for what happened. The plaintiff experienced no pain in his back before he fell, and he felt no strain as he lifted and carried one handle of the tie tongs, nor had he exhibited or felt any specific physical symptoms of ill being before he lost consciousness and fell. He simply stated that "he didn't know what happened." Under the circumstances, the jury's conclusion that the plaintiff's injuries were causally related to defendant's claimed negligence in returning him to work, would necessarily be based entirely on surmise or conjecture. This cannot be the basis upon which a verdict can be sustained (Withey v. Illinois Power Co., 32

Ill. App. 2d 163, 170). We have repeatedly stated that under the law, an affirmative and positive showing of actionable negligence as the proximate cause of injuries, must be made. The fundamental basis of a right to recover must necessarily be a showing of a causal connection, ascertainable from the evidence and the record, or circumstances which clearly establish such connection, before a recovery can be sustained.

Under the facts and circumstances on the record before us, we cannot say that there was positive proof of actionable negligence as the proximate cause of the injuries suffered by plaintiff (Withey v. Illinois Power Co., supra; Deming v. Hallberg, 221 Ill. App. 180; Jensen v. Elgin Joliet & Eastern Ry. Co., 15 Ill. App. 2d 559). In the latter case cited, the plaintiff had, likewise, maintained an action under the Federal Employers' Liability Act, to recover damages for a ruptured intervertebral disc which he received as the result of defendant's negligence in maintaining a defective switch. The Appellate Court there likewise concluded that plaintiff had failed to show a causal connection between the injury and the accident, and the Court there rightly points out that the burden was on the plaintiff to establish by a preponderance of the evidence not only that the injury existed, but also that the injury was the result of an occurrence of which he complained. The Court in that case pointed out that the disability of the plaintiff and its cause could have been a matter of expert opinion which should have been proved by testimony of medical experts and not left to the speculation of the jury, and that in absence of a showing of such causal connection between the accident and the injury, no recovery could be had.

We, therefore, conclude that the Trial Court should have allowed the motion for directed verdict, or for a judgment notwithstanding the verdict, and the judgment of the

Circuit Court of Madison County will, therefore, be reversed and judgment entered here in favor of defendant.

Reversed, and judgment entered here.

Scheineman, J., and Hoffman, J., Concur.

Publish in full.

Filed June 3, 1963, James R. McLaughlin, Clerk of the Appellate Court, Fourth District of Illinois.

I, James R. McLaughlin, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, Do Hereby Certify, that the foregoing is a true copy of the Opinion of the said Appellate Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed my seal of said Court at Mt. Vernon, this 3rd day of June, A. D. 1963.

James R. McLaughlin,
Clerk of the Appellate Court.

(Seal)